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IN THE

Supreme Court of the United States

No. ....., Misc.

October Term, 1955.

GEORGE C. WICKS,

Petitioner,

vs.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, AND SOUTHERN PACIFIC COMPANY,

Respondents.

PHILLIP F. JENSEN,

Petitioner,

vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND UNION PACIFIC RAILROAD COMPANY,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

Petitioners move the Court for leave to file the petition for a writ of mandamus hereto annexed; and further move that an order and rule be entered and issued directing the Honorable The United States District Court for the Southern District of California, Central Division, and the Honorable Benjamin Harrison, Judge of said Court, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of

said petition, and why your petitioners should not have such other and further relief in the premises as may be just and meet.

HILL, FARRER & BURRILL,
CARL M. GOULD,
RAY L. JOHNSON, JR.,
Attorneys for Petitioners.

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vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND UNION PACIFIC RAILROAD COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Alternatively Petition for a Writ of Mandamus to the United States District Court for the Southern District of California, Central Division, and the Honorable Ben Harrison, Judge of Said Court.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 6, 1956, or, alternatively, that this Honorable Court issue an order and rule directing the Honorable United States District Court for the Southern District of California, Central Division, and the Honorable Ben-

jamin Harrison, Judge of said Court, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer filed by petitioners herewith, and why your petitioner should not have such other and further relief in the premises as justice may require.

Opinions Below.

The opinion of District Judge Harrison is reported at 121 Fed. Supp. 454 and is printed as Appendix B hereto, *infra,* App. page 4. The opinion of the Court of Appeals is as yet unreported but is printed as Appendix C hereto, *infra* App. page 9.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 6, 1956. No rehearing has been sought. The certiorari jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). Jurisdiction of the Court to issue a writ of mandamus is found in 28 U. S. C. §1651(a), and is sustained by previous decisions of the Court.

In the trial court injunctive relief was sought against the enforcement and operation of an Act of Congress on the ground that it violates the First and Fifth Amendments to the Constitution of the United States. The statute involved is Section 2, Eleventh, of the Railway Labor Act, which was added to the basic act by amendment in 1951. 45 U. S. C. §152, Eleventh. It is printed in Appendix A hereto, *infra,* App. page 1.

In the district court, petitioners requested that a three-judge district court be convened in accordance with the provisions of 28 U. S. C. §2282. District Judge Harrison denied their applications. He ruled (1) that there is no

governmental action in the conduct sought to be enjoined and (2) even if there were governmental action the constitutional arguments presented by the petitioners are without merit.

Thereafter, while preparing for arguments in the Court of Appeals, a line of authorities was uncovered which indicated that petitioners' remedy was a petition for mandamus directed to this Honorable Court rather than an appeal through the usual channels. Arguments were heard before the Court of Appeals on October 24, 1955. At that time, it was suggested to the court that it might not have jurisdiction in the case. The authorities to be discussed hereafter were called to its attention.

The Court of Appeals has rejected petitioners' jurisdictional contentions, largely, it seems, because it did not understand the problem and the import of the cases cited to it. The better part of its opinion is devoted to a point not in issue, that is, that a single district judge has authority to determine in the first instance whether there is a substantial federal constitutional issue presented by a complaint upon which a request for a three-judge court is based. No one has questioned that—the question is what is the remedy when a single judge declines to convene a three-judge court on the ground that the case does not present a substantial federal constitutional question? The Court of Appeals has ruled that in such a situation it has jurisdiction on appeal. The basis for this conclusion is not clearly stated, but the reasoning behind it appears to be that if the district court had jurisdiction then the Court of Appeals likewise has jurisdiction.

This conclusion does not at all follow from the premise, and in reaching it the Court of Appeals has brought

itself into apparent conflict with authorities which establish a procedure which excludes a Court of Appeals entirely from a case in which the complaint on its face brings it within the terms of 28 U. S. C. §2282, calling for a three-judge court.

The situation appears to be this. Where a single district judge is presented with a complaint in which injunctive relief is sought on the basis of asserted unconstitutionality of an Act of Congress, then the action comes within the provisions of 28 U. S. C. §2282. In the overwhelming majority of cases, the judge has no alternative but to call in two others to make up a three-judge court. The decision of the three judges may be carried to this Court by a direct appeal under 28 U. S. C. §1253, and no appeal lies to a Court of Appeals.

There is only one situation in which a single judge can decline to assemble a three-judge court, and that is when the constitutional question asserted in the complaint is obviously lacking in merit. *California Water Service Co. v. City of Redding,* 304 U. S. 252, 255. If a three-judge court is refused, then it appears that the plaintiff's remedy is not an appeal through the usual channels but an application directly to this Court for a writ of mandamus directed to the district judge requiring him to assemble a three-judge court and hear the case. Thereafter, of course, the three-judge court's decision on the merits can be carried to this Court by direct appeal under 28 U. S. C. §1253.

These are the authorities:

(1) *Stratton v. St. Louis S. W. Ry. Co.,* 282 U. S. 10, involved an action for injunctive relief on the basis of asserted unconstitutionality of an Illinois statute. The

plaintiff had asked for a three-judge court. On defendant's motion, however, a single district judge dismissed the complaint and dissolved a temporary restraining order which had previously been issued. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the statute was held to violate the federal constitution, the trial court's decree was reversed, and the case was remanded with directions to enter a decree in accordance with the appellate opinion.

On an appeal taken to it, this Court reversed and remanded to the Circuit Court of Appeals with directions to dismiss for want of jurisdiction, saying:

> ". . . [W]here a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceedings, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. . . . *This remedy would not be available if there were a remedy by appeal.*" 282 U. S. at 16. (Emphasis supplied.)

(2) In *Waddell v. Chicago Land Clearance Commission*, 206 F. 2d 748, the plaintiff was attacking the validity of an Illinois statute which had already been in litigation for several years. He argued that a three-judge court be convened under 28 U. S. C. §2281, but the district court dismissed the complaint for lack of a substantial federal question. On appeal to it, the Court of Appeals for the Seventh Circuit dismissed the complaint. It said that, even assuming the soundness of the appellant's arguments, still it had no jurisdiction to entertain an appeal

from the district court. Regarding the proper avenue of review, it said:

> "A petition for a writ of mandamus is the appropriate remedy. *Ex parte* Poresky, 1933, 290 U. S. 30 . . . Stratton v. Saint Louis, Southwestern Ry. Co., 282 U. S. 10. . . . Thus, even though appellants' position be correct, their only recourse lies in an application to the Supreme Court for leave to file a petition for a writ of mandamus." 206 F. 2d at 750.

(3) In *Ex parte Poresky*, 290 U. S. 30, and *Ex parte Collins*, 277 U. S. 565, this Court entertained petitions for writs of mandamus to have three-judge district courts convened. Although the writ was denied in each case, the fact that it passed on each application on its merits indicates that mandumus is the proper remedy when it is thought that a single district judge has erroneously declined to assemble a three-judge court. See also *Gray v. Board of Trustees*, 342 U. S. 517, 518.

The Court of Appeals has concluded that mandamus lies only where a district judge decides that a complaint does raise a substantial constitutional question but refuses to convene a three-judge court and proceeds to determine the merits of the constitutional question himself. The Court has thereby brought itself into square conflict with this Court's decision in *Stratton v. St. Louis S. W. Ry., supra*, and with the decision of the Court of Appeals for the Seventh Circuit in *Waddell v. Chicago Land Clearance Commission, supra*. Both of those cases involved action of a single district judge analogous to that in the instant case. Neither involved a situation where a single judge refused to convene a three-judge court and then decided the constitutional questions on their merits.

In each, however, it was specifically held that mandamus rather than appeal was the procedure for review of the district judge's action.

Petitioners submit that the Court of Appeals erred in concluding that it had jurisdiction in this case. It seems abundantly clear from the foregoing authorities that this Court has jurisdiction to issue the writ of mandamus prayed for.

In the event, however, that petitioners are in error on this score, then, of course, the Court of Appeals did have jurisdiction and its judgment is reviewable by this Court on writ of certiorari under 28 U. S. C. §1254(1).

Questions Presented.

1. Is there not "government action" requiring decision of constitutional questions where—

(a) Congress has passed a statute affirmatively legalizing compulsory unionism, in the form of a union shop, for the railroad industry, and striking down all conflicting state laws;

(b) Congress added the statute to existing railroad labor legislation with the intention of thereby bringing about a nation-wide union shop in the railroad industry;

(c) Where a labor union, invested by Congress with a special status as a statutory exclusive collective bargaining agent, demands, obtains, and then seeks to enforce a union shop pursuant to the explicit statutory authorization by Congress; and

(d) Where the Executive Department of the Federal Government, acting on the theory that Congress had established a governmental policy favoring a

nation-wide union shop on the railroads, recommends and pressures the railroads to enter into the union shop form of compulsory unionism?

2. When a man's religious convictions will not allow him to join or pay his money to a labor union and thereafter with the sanction of an Act of Congress, he is fired from his job for his refusal to join and pay his money to a union, has he not been unconstitutionally deprived of the freedom of religion guaranteed to him by the First Amendment to the Constitution of the United States?

3. When a man is fired from his job solely because of his refusal to join and pay his money to a labor union, has he not been deprived unconstitutionally of the right to work guaranteed him by the Fifth Amendment to the Constitution of the United States?

4. When a man is fired from his job solely because of his refusal to join and pay his money to a labor union, has he not been deprived unconstitutionally of the freedom of association guaranteed him by the First and Fifth Amendments to the Constitution of the United States?

5. When a man is forced against his will to pay his money to a labor union in order to hold his job, is he not thereby deprived of his property in violation of the due process guaranty of the Fifth Amendment?

Statute Involved.

The statutory provision involved is Section 2, Eleventh, of the Railway Labor Act, 45 U. S. C. §152, Eleventh. It is printed in Appendix A, *infra*, App. page 1.

Statement.

This lawsuit is not between employer and employee or between employer and union. It is an action by individual employees against their employers and the unions empowered by Section 2, Fourth, of the Railway Labor Act to act as the employees' exclusive collective bargaining agent.

From 1934 until 1951, Section 2, Fourth and Fifth, of the Railway Labor Act forbade railroads and labor unions representing their employees to make union membership a condition of employment. 45 U. S. C. §152, Fourth, Fifth. This proscription extended to all forms of compulsory unionism—including the closed shop, the union shop, maintenance of membership agreements, and percentage contracts.

This was changed by amendment in 1951, however, when Congress added Section 2, Eleventh, to the Railway Labor Act. 45 U. S. C. §152, Eleventh. This amendment, now in force, specifically legalizes a form of the union shop. (See Appendix A.) This amendment was directed not only to Sections 2, Fourth and Fifth, of the Act, insofar as those sections prohibited union shop agreements, but it also explicitly provides that its grant of authority is to supersede any and all conflicting law, not only conflicting federal law but also conflicting state law. By this sweeping provision, the railroad unions have been exempted from the application of present and prospective state right-to-work laws which prohibit all forms of compulsory unionism in the same manner that they were prohibited by Sections 2, Fourth and Fifth, of the Railway Labor Act prior to the Amendment of 1951. These right to work laws were upheld by the Court

in the face of a constitutional attack by the unions in *Lincoln Union v. Northwestern Co.*, 335 U. S. 529, and *American Federation of Labor v. American Sash & Door Co.*, 335 U. S. 538.

Immediately upon enactment of the Union Shop Amendment of 1951 to the Railway Labor Act, the unions put their demands for a union shop to the railroads. These demands sought to have union membership made a condition of employment in the non-operating crafts on every Class I railroad in the United States, including the Union Pacific and the Southern Pacific. The demands were refused by the nation's rail carriers, and the resulting dispute was referred by President Truman to Emergency Board No. 98, especially appointed pursuant to the provisions of Section 10 of the Railway Labor Act, 45 U. S. C. §160. This Board held hearings as required by the Act and thereafter, in its Report to the President, dated February 14, 1952, returned an affirmative recommendation that the railroads sign union shop agreements in accordance with the demands of the labor organizations.

On March 7, 1953, the Union Pacific Railroad, employer of petitioner Jensen, signed an agreement which added to the collective bargaining agreement then in force with the non-operating unions a provision making union membership a condition of continued employment. The Southern Pacific, employer of petitioner Wicks, had signed a similar agreement on February 4, 1953.

At the time when their employers agreed to the union shop, petitioners were among those of their employees

who did not belong to the union representing the persons in their respective craft or class of employment.[1] Petitioners were each notified by their employer after the signing of the union shop agreement that under its terms he would have to join and support the union representing his class or craft of employment or be fired from his job.[2] They replied that one of the doctrines of the Plymouth Brethren—their particular religious creed—absolutely precluded them from joining in any private organization or association which has in its membership persons not members of the Plymouth Brethren. This doctrine is derived from the New Testament, Second Corinthians, Chapter 6, Verse 14:

> "Be not diversely yoked with unbelievers; for what participation is there between righteousness and lawlessness? or what fellowship of light with darkness?"

The unions offered to excuse petitioners from all obligations of membership except payment of initiation fees, dues, and assessments. They replied, however, that even this would constitute their being "diversely yoked with unbelievers," so that they could not in conscience agree

---

[1]Petitioner Wicks had belonged to the Brotherhood of Maintenance of Way Employees for a period of about four years. He had terminated his membership some five years before the Southern Pacific signed the union shop agreement upon becoming a member of the Plymouth Brethren, a religious organization.

[2]In the case of petitioner Wicks it was the Brotherhood of Maintenance of Way Employees. At that time Wicks enjoyed seniority totalling about thirty-eight years. Jensen was ordered to join the Brotherhood of Railway Clerks. He had about thirty-five years' seniority.

to the unions' compromise proposal. Jensen did offer to pay to a national charity amounts equal to the unions' fees, dues, and assessments, but this counter-proposal was rejected by the Brotherhood of Railway Clerks. Wicks refused to compromise his religious convictions even to this extent.

The notice and hearing provisions of the union shop agreement were followed to their conclusion. These inevitably resulted in each petitioner being served with a notice to the effect that because of his refusal to join and support the union representing his craft or class of employment he was to be discharged from his job as of a specified date.

Before they were actually discharged, however, petitioners applied for and were granted temporary restraining orders in suits for permanent injunctive relief instituted against their employers. In their complaints they charged that Section 2, Eleventh, of the Railway Labor Act, authorizing the signing and enforcement of union shop agreements, is violative of the First and Fifth Amendments to the Federal Constitution in that it unconstitutionally deprives them of their freedom of religion, their right to work, their freedom of association, and their property. Each applied for appointment of a three-judge court under 28 U. S. C. §2282 to hear his case.

The unions involved and named as Respondents in this Court intervened as parties defendant and have since carried on the active defense to petitioners' complaints.

The carriers have been passive parties since the unions' intervention.

Petitioners' cases were consolidated and came on for hearing before the Honorable Ben Harrison, District Judge. He ruled that there was no governmental action involved in the conduct sought to be enjoined by the complaints so that no constitutional questions were presented. Alternatively, he went on to rule that even if governmental action were involved the constitutional arguments advanced by petitioners were unsound. His opinion is set out as Appendix B, *infra*, App. page 4.

Judge Harrison dissolved the temporary restraining orders theretofore issued, denied the applications for a three-judge court, and denied the applications for permanent injunctions. The motions of respondent unions for summary judgments were granted.

Petitioners appealed to the Court of Appeals for the Ninth Circuit which held (1) that it had jurisdiction on appeal, and (2) that there are no substantial constitutional questions because there is no governmental action involved. The latter conclusion was predicated on the court's ruling that the statute involved is a mere *pro tanto* repeal and does not affirmatively legalize the union shop.

REASONS FOR GRANTING RELIEF PRAYED FOR.

1. The Courts Below Have Erred in Their Decision That There Is No Governmental Action in This Case and Their Holding Is in Conflict With Decisions of the Highest Courts of Two States and With Previous Expressions of This Court.

(a) Clearly, the Governmental Action Question Cannot Be Regarded as so Insubstantial as to Excuse the District Judge From Convening a Three-Judge District Court.

As indicated in the preceding consideration of the jurisdiction question, a single district judge can refuse to convene a three-judge court in a case in which the complaint brings it within 28 U. S. C. §2282 only when the constitutional question is obviously lacking in merit. *California Water Service Co. v. City of Redding, supra.*

If one thing is certain in this case, it is that the assertion of governmental action is not frivolous. In holding otherwise, the district judge and the Court of Appeals are in conflict with a decision of the Supreme Court of Nebraska and with a decision of the Supreme Court of Kansas, as well as with previous expressions of this Court.

In *Hanson v. Union Pacific Railroad Co.*, 160 Neb. 669, 71 N. W. 2d 526, now before this Court on appeal as No. 451 *sub nom. Railway Employes' Dept., A. F. of L. v. Hanson,* the same issues presented by petitioners' cases, excluding freedom of religion, were raised before the Supreme Court of Nebraska. The unions urged to that court that there is no governmental action in the

operation of Section 2, Eleventh, of the Railway Labor Act. The Nebraska court, however, rejected the unions' contentions and ruled (1) that there is governmental action involved in a man's discharge from employment pursuant to the term of a union shop agreement expressly sanctioned by Section 2, Eleventh, of the Railway Labor Act, and (2) that such a discharge from employment would unconstitutionally deprive a man of the right to work and freedom of association guaranteed him by the First and Fifth Amendments to the Federal Constitution.

Betts v. Easley, 161 Kan. 159, 169 P. 2d 831, involved an action by a group of Santa Fe Railway employees to enjoin certain officers of the Brotherhood of Railway Carmen of America from excluding them, as Negroes, from full participation in the union, and, further, to enjoin the union officers from requiring that they belong to a segregated lodge. The trial court sustained a demurrer to the complaint on the ground that the action complained of was merely that of a private association of individuals not subject to the Fourteenth Amendment. See 169 P. 2d at 836. The Supreme Court of Kansas reversed, ruling that the action of the unions did involve government action and did deny the Negroes involved their constitutional rights. 169 P. 2d at 838.

In the light of these decisions, it is submitted that the district judge had no alternative in this case but to have a three-judge court convened in accordance with petitioners' applications. His failure to do so was error and should be corrected by a writ of mandamus issued by this Court.

(b) Decisions of Other Courts Aside, It Is Clear That There Is Governmental Action in the Conduct Sought to Be Enjoined by Petitioner's Complaints.

In holding that under the facts alleged in the complaints there is no government action present sufficient to raise constitutional issues, the district judge and the Court of Appeals have compounded the error of Judge Learned Hand in *Otten v. Baltimore & Ohio R. Co.*, 205 F. 2d 58.

The courts below have concluded that there is no governmental action in this case because Section 2, Eleventh, is nothing more than a repeal *pro tanto* of paragraphs Fourth and Fifth of Section 2 which proscribe all forms of compulsory unionism.

This conclusion is in error. It is a product of misreading Section 2, Eleventh, itself—of ignoring altogether some of the vitally important provisions of the section. It also appears to stem from a failure to understand that the question of government action does not turn solely on Section 2, Eleventh, but on the broad panoply of statutory powers and privileges vested in the unions by the whole of the Railway Labor Act.

To be sure, the Union Shop Statute does amend in part the prohibition of compulsory unionism in all forms found in paragraphs Fourth and Fifth of Section 2, and therefore may be regarded as accomplishing a *pro tanto* repeal. But the point inexplicably overlooked by the courts below is that the Statute does not stop there. It is much more than a mere repealer:

A. Considered alone, it is an affirmative grant of permission and an extensive regulatory measure—

(1) It affirmatively legalizes the union shop by expressly providing that it "shall be permitted";

(2) It prescribes in detail the limits of the type of union shop agreement to which its authorization extends; and

(3) It sweeps aside all present and prospective conflicting federal and state law.

B. Considered in the context of the whole Railway Labor Act it is an integral part of the Congressional scheme for regulation of railroad labor relations which involves the hand of government in all railroad union activities.

First. On its face the Union Shop Statute clearly does much more than merely repeal conflicting portions of Section 2, Paragraphs Fourth and Fifth. It spells out the authority it confers and the parties to whom it is extended:

> ". . . [A]ny carrier . . . and a labor organization . . . duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) To make agreements, requiring [a union shop]. . . ."

Surely this—and particularly the words "shall be permitted"—make it perfectly plain that this provision is an affirmative grant of legislative authority and cannot be relegated to the status of a mere repealer.

Second. The Statute prescribes in some detail the type of union shop agreement which it authorizes, thereby flatly contradicting the theory of a mere repeal. Subparagraph (a) specifies the content of certain of the more important provisions found in union shop agreements. Subparagraph (c) makes further provisions along the

same line and specifies how the requirement of union membership under a union shop agreement may be satisfied. These provisions are clearly regulatory and are affirmative new legislation prescribing rules for the future as well as the present.

Third. The statute undertakes to override and supersede all present and prospective conflicting federal and state law by providing that union shop agreements shall be permitted:

> "Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State. . . ."

How can a statute which in one fell swoop renders inapplicable an extensive body of federal and state law be treated as a simple repealing measure? In the area of state law alone it is obvious that a great deal more than a repeal is effected, for if the Union Shop Statute really did nothing more than repeal Section 2, Fourth and Fifth, to the extent that the latter forbid union shop agreements, then there would be no federal regulation regarding the union shop and state law would be applicable. But, of course, state law cannot be applicable—the Union Shop Statute specifies that its authorization of union shop contracts prevails "Notwithstanding . . . any statute or law of any State. . . ." The "mere repeal" argument, therefore, flounders helplessly in its own illogic.

Fourth. Even though governmental action is manifest on the face of the Union Shop Statute itself, still the Court of Appeals and the district court erred in failing to consider the fact that the Statute does not stand alone

and the test of the presence of government action cannot properly be limited to the face of the Statute.

There is in truth a superabundance of governmental action in this case when the Union Shop Statute and the action of the unions are evaluated, as they surely must be, in the light of the whole Railway Labor Act. The heavy hand of the Federal Government has been behind the unions at every step of the conduct against which injunctive relief is sought by the complaints in these cases.

Consider the ten other paragraphs of Section 2 of the Railway Labor Act, 45 U. S. C. §152. Paragraph First makes it an absolute duty of railroads to exert "every reasonble effort to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." In *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515, 548, this Court ruled that the duty to bargain imposed on the carriers by this provision of the Act is mandatory.

Paragraph Second provides for consideration of disputes by representatives of the carriers and representatives of the unions. Paragraph Third provides for the free selection of bargaining representatives without "interference, influence, or coercion," and with respect to designation of employees' representatives it is specially stated that:

> "Representatives of employees . . . need not be persons in the employ of the carrier, and no carrier shall, by interference, influence or coercion seek in

any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Paragraph Fourth is carefully drawn and of far-reaching import. It provides, first, that employees "shall have the right to organize and bargain collectively through representatives of their own choosing." Statutory sanction is thereby extended to the individual right of workers to organize and bargain collectively through labor unions. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 34; *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 263; *Auto Workers v. Wisconsin Board*, 336 U. S. 245, 259.

The succeeding sentence of paragraph Fourth is of extreme significance for it vests in the unions a totally artificial statutory power. It provides that:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter."

This provision gives to a union selected by a majority of employees in any craft or class a monopoly of the bargaining for that craft or class. The workers who do not vote for the organization selected by the majority are deprived of their right to be represented by a union of their own choice and also are deprived of their right to bargain for themselves. Of an analogous provision in the National Labor Relations Act, a three-judge court in the District of Columbia said, in *National Maritime Union v. Herzog*, 78 F. Supp. 146, 155-156, aff'd 334 U. S. 584:

> "Congress . . . added to the fundamental right of employees to organize and to bargain with their

employers, certain important privileges and benefits which had not existed theretofore. Not only was the right to organize unions and to bargain through them affirmed; but also the privilege of becoming the exclusive bargaining agent of all employees in a bargaining unit was extended to a labor organization favored by a majority of such employees. Moreover, employers were required to bargain collectively with the representative chosen by majority vote. This, to be sure, was an abridgement of the minority's fundamental rights, as well as those of employers. But the importance of the broad public purpose sought to be served justified the means employed."

The remaining portions of paragraph Fourth reaffirm the right of employees to join labor unions free from any form of employer coercion.

Paragraph Fifth of Section 2 guards not only against compulsory unionism agreements but also against compulsory non-unionism agreements:

> "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way."

Paragraph Sixth provides for conferences between unions and carrier representatives in cases of disputes "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ." Paragraph Seventh concerns changes in pay, rules, or working conditions. Para-

graph Eighth provides for carriers posting printed notices to employees regarding their rights under the Railway Labor Act and states that certain paragraphs are to be set out verbatim and become a part of the contract of employment between the carriers and each of their employees.

Paragraph Ninth provides for settlement by the Mediation Board of any dispute "among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter. . . ." Paragraph Tenth provides serious criminal penalties of fine and imprisonment, applicable only to carriers and their officers and agents, for "willful failure or refusal" to comply with the terms of paragraph Third, Fourth, Fifth, Seventh and Eighth.

So much for Section 2 of the Act. But Section 2 does not stand alone. Section 1 is a very careful definition of terms. 45 U. S. C. §151. Section 2a defines the general purposes of the Act. 45 U. S. C. §151a. Section 3 establishes and prescribes the procedure of the National Railroad Adjustment Board. 45 U. S. C. §153. Sections 4 and 5 pertain to the National Mediation Board, providing for its establishment and functions. 45 U. S. C. §§154, 155. Section 6 establishes the procedure to be followed by carriers and unions in effecting changes in rates of pay, rules, or working conditions. 45 U. S. C. §157. Sections 7, 8 and 9 establish an arbitration procedure. 45 U. S. C. §§157, 158, 159. Finally, Section 10 is that which makes provision for appointment of Presidential Emergency Boards, like Emergency Board No. 98, which considered the union shop dispute. 45 U. S. C. §160.

The sum total of these provisions, including Section 2, Eleventh, of course, is complete preemption by Congress of the field of railroad labor relations. When the full spread of the Federal Act is considered, and the position of the unions under all of the provisions of the Act is properly evaluated, how can it be denied that in the action complained of here the unions have had the indispensable assistance of Congress and the Executive Department of the Federal Government?

The Supreme Court of Kansas recognized the true situation in *Betts v. Easley*, 161 Kan. 159, 160 P. 2d 831. In that case certain union officers functioning under the Railway Labor Act argued that they were officers of private organizations, and, as such, their discriminatory action against Negroes could not give rise to constitutional issues under the Fifth Amendment. The Kansas court rejected the argument in these words:

> "In the light of the history and purpose of the [Railway Labor] Act, as construed in many decisions, the trial court's view that the acts complained of are solely those of 'a private association of individuals' is wholly untenable. *The Acts complained of are those of an organization acting as an agency created and functioning under provisions of Federal law.* This being true, it is unnecessary to consider appellees' contention that the Fifth Amendment is not here applicable because it relates only to action by the Federal government and not to acts of private persons. Nor do we need to inquire whether appellees' statement as to the operation of the Fifth Amendment is too broadly stated. In any event the constitutional guarantees of due process, whether under the Federal or state constitutions, are to be liberally construed to effectuate their purposes, and

> are a restraint not only upon persons holding positions specifically classed as executive, legislative or judicial, but upon all administrative and ministerial officials who act under governmental authority. * * * *While claiming and exercising rights incident to its designation as bargaining agent, the defendant union cannot at the same time avoid the responsibilities that attach to such statutory status.*" 169 P. 2d 838. (Emphasis supplied.)

So it must be in this case—"The acts complained of are those of an organization acting as an agency created and functioning under provisions of Federal law."

It was suggested by Judge Hand in his *Otten* decision that if the law of New York, the place of the contract and of the employment in that case, forbade the union shop—which it did not—then a constitutional question might plausibly arise. The courts below here have held that this reasoning is fully applicable to this case for the reason that in California there is likewise no prohibition against union shop agreements.

The pervading fallacy in this is that it concedes the presence of government action in those states which have right-to-work laws proscribing union membership and at the same time denies its presence in other states which do not have such laws. The anomalous result is that railway employees in some states can assail the Union Shop Amendment of 1951 to the Railway Labor Act on constitutional grounds while those in other states cannot. For example, under this view a Southern Pacific employee in Arizona could make a constitutional attack on the Statute but a different employee of the same carrier just across the line in California, like Wicks or Jensen, could not. Of course, no such situation can logically exist—

either there is government action involved in union shop agreements entered into with the express sanction of the Union Shop Amendment of 1951 everywhere or there is none anywhere. Both Judge Hand in the *Otten* case and the courts below here have tacitly conceded government action in some states—that is, in those which prohibit compulsory unionism—so that it necessarily follows that there must be government action in all of the states, including California.

The courts below, particularly the district court, have also followed the *Otten* decision in ruling that this case does not involve governmental action because the challenged statute does not "affirmatively legalize" union shop contracts. This too is error, for the Union Shop Statute most assuredly does affirmatively legalize the union shop and in such a way as to constitute government action. It specifically says, as previously outlined, that the union shop "shall be permitted." It thus expressly legalizes an arrangement whereby "as a condition of continued employment * * * all employees shall become members of the labor organization representing their craft or class." If, as we contend, this violates the right to work, freedom of religion, and the freedom of association guaranteed petitioners by the First and Fifth Amendments to the Federal Constitution, then what we have is a plain case in which Congress has enacted a statute to permit what the Constitution forbids.

But whether or not Congress has exceeded its powers, it has taken governmental action when it passes a statute affirmatively decreeing that this particular arrangement shall be legal. It is beside the point to suggest, as Judge Harrison did, that in California, as in New York, the

statutory legalization of the arrangement was superfluous and unnecessary. Regardless of the occasion therefor, Congress did pass the statute, it did legalize the union shop, and did authorize the very agreement subsequently entered into between the railroads and the unions under the provisions of which petitioners are threatened with discharge from their employment.

When the Union Shop Statute was enacted in 1951 there were about 12 states which forbade compulsory unionism in all forms through right-to-work laws. At present 18 states are in this category.[8] The Statute expressly overrides and sweeps these laws aside insofar as they might be applied to railroad employees.

It is difficult to imagine a more vivid example of affirmative legalization than such a law which exempts union shop agreements from the proscription of state law. And this exemption necessarily extends not only into those states which had right-to-work laws at the time of the enactment of the statute but into all others as well. Those states which did not then have such laws—and which have not passed any to date, such as New York and California—have been told by Congress in specific terms that they are forbidden to proscribe compulsory unionism in the railroad industry.

There are, in truth, three forms of government action involved in this case. The first is legislative action—the passage by Congress of the Union Shop Statute. That is government action *per se* and it has furnished indis-

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[8]Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah and Virginia.

pensable assistance to respondent unions in their drive to establish compulsory unionism as the norm for the railroad industry.

The second is executive action found in the intervention of the National Mediation Board (which considered the dispute in its early stages following enactment of the statute by Congress), in President Truman's appointment of Emergency Board No. 98, and in the action of Board 98 recommending that the railroads, including the Union Pacific and the Southern Pacific, accede to the unions' demands for a nationwide union shop.

The third form of government action is found in the unions' conduct in their role as "statutory bargaining agents," the phrase customarily used by them to describe their own status. They are indeed "statutory agents" and, enjoying that position by the grace of Congress, their conduct is subject to review for conformity with the Bill of Rights. Their position under the Railway Labor Act, as detailed previously herein, precludes any contention that they function as purely private organizations. Any organization which is so armed with special powers and privileges by the government cannot avoid constitutional limitations on governmental power.

The trial court concluded this branch of its opinion with the observation that ". . . [T]he plaintiffs are not entitled to protection of the First Amendment of the United States Constitution because that amendment protects only against Congressional action and it is not shown here that the action complained of is Congressional." 121 F. Supp. at 457. The error implicit in this ruling is that it restricts the operation of the guaranties of the first ten Amendments to the Constitution to direct action by

the legislative branch of government. It totally ignores the fact that the Constitution reaches indirect as well as direct exercises of authority by any of the three branches of government.

It was settled as early as 1883, in the *Civil Rights Cases*, 109 U. S. 3, 11, 17, that action which may appear to be that of private parties and thereby immune from constitutional requirements is subject to the restraints of the Constitution when it has been sanctioned in some way by the government. This ruling that indirect as well as direct government action gives rise to constitutional questions was expressly reaffirmed only a few years ago in *Shelley v. Kraemer*, 334 U. S. 1, 14. It has frequently been affirmed in practice but without citation.

An excellent example of this is *Public Utilities Comm. v. Pollak*, 343 U. S. 451. In that case, the local traction company in the city of Washington, D. C., put into operation a plan of receiving radio broadcasts on its busses and trolleys. There were no governmental regulations pertaining to this practice and it was instituted without the permission of any governmental body. However, a number of riders complained about it to the Public Utilities Commission of the District of Columbia. That body held a public hearing on the matter, determined that it was not adverse to the public interest, and permitted it to be continued. The riders went to court, contending that their rights to privacy under the First and Fifth Amendments were being abridged. When the case reached this Court it passed upon the constitutional questions raised on their merits after first finding that the company action complained of involved the requisite government action. Thus, although the Capital Transit Com-

pany was not a government agency and had not been ordered by any agency to receive radio broadcasts on its busses and trolleys, government action sufficient to raise constitutional issues was found in the indirect participation—the permissive action—of the Public Utilities Commission.

This Court's decision in the *Pollak* case is also one of several which conclusively put to rest any contention that the Union Shop Amendment of 1951 is beyond the reach of the constitutional safeguards because it is in form "permissive." The activity complained of in *Pollak* had not been directed by government in the first instance and its continuation after a public hearing was in no way required. In fact, it has since been discontinued without any direction from a governmental agency. The permissive action of the Public Utilities Commission in declining to stop the practice upon the complaint of the riders was sufficient in itself to raise constitutional issues.

This Court certainly does not doubt that action pursuant to a statute permissive in character gives rise to constitutional issues. Last Term, in the last phase of the segregation cases, it said:

> "These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or *permitting* such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded." *Brown v. Board of Education*, 349 U. S. 294, 298. (Emphasis supplied.)

This Court has already recognized that because of the position in which the unions are placed by the Railway Labor Act their action is no longer "private." In *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, the Court said in so many words that if the Act authorized unions to discriminate against Negroes whom they represented in collective bargaining then constitutional questions would be presented. 323 U. S. at 198-199. Implicit in this is the view that government action is sufficiently involved in union conduct authorized by statute that constitutional issues are raised. So too with respect to compulsory unionism—does it not follow from this portion of the Court's opinion in the *Steele* case that there is government action involved here where Congress has, by the Union Shop Amendment to the Railway Labor Act, expressly authorized the action complained of?

This case does not involve the contract complained of and nothing more. It also necessarily reaches every operative fact surrounding its signing and enforcement. That these facts must be taken into account has been made clear by a number of recent decisions concerning racial restrictive covenants. Although these cases have on the surface involved only private agreements it has been held that this does not exclude the courts from a practical appreciation of the role of government in their enforcement and the resulting constitutional issues. Because racial restrictive agreements invade constitutional liberties, they may not be enforced in equity, *Shelley v. Kraemer*, 334 U. S. 1; nor may their breach be made the subject of an action at law for damages, *Barrows v. Jackson*, 346 U. S. 249; nor may they be set up in a defense in an action to try title, *Clifton v. Puente*, 218 S. W. 2d 272 (Texas Court of Civil Appeals, San Antonio).

The statutory position of the unions was recognized by this Court years ago in a somewhat different context but in such a fashion that it is difficult to understand how one could deny that there is government action in the case now at bar. In *Virginian Railway v. System Federation No. 40,* 300 U. S. 515, the Court reviewed the absolute duty imposed on railroads by Section 2 of the Railway Labor Act to bargain with union representatives of employees with respect to wages, hours, and working conditions. It ruled that imposition of this absolute duty to bargain did not infringe the rights secured to carriers by the Fifth Amendment. 300 U. S. at 557. As a necessary but unspoken preliminary to this ruling was the finding of the Court that the case involved government action sufficient to raise the constitutional questions. The question of government action had to be resolved in the affirmative, for otherwise there would have been no constitutional questions presented. Consequently, the fact that the Court decided the constitutional issues presented shows conclusively that it also decided the question of government action in the affirmative.

The *Virginian* case, as noted, involved the compulsory duty of carriers to bargain with respect to wages, hours, and working conditions. It did not involve bargaining for compulsory unionism, for the Railway Labor Act as it was then in force prohibited compulsory unionism in any form. If, as is the fact, there was government action in the *Virginian* case where all that was involved was compulsory bargaining for wages, hours, and working conditions, not including compulsory unionism, does it not inevitably follow that the requisite government action is presented here where the ultimate issue is com-

pulsory bargaining for compulsory unionism? Of course, since the *Virginian* case did not involve compulsory bargaining of the kind questioned here the opinion therein rendered cannot be taken as an expression on the merits in this case. Respondents have urged that petitioners' contention that the Union Shop Amendment is unconstitutional amounts to no more than a claim that they have a constitutional right to have Congress continue the proscription of all forms of compulsory unionism contained in the 1934 Amendment to the Railway Labor Act. This is a cleverly misleading argument—it assumes its premise and thereby glosses over its error. The Union Shop Amendment did a great deal more than simply repeal the previous ban against agreements making union membership a condition of employment. We have already considered that at some length. The Amendment is a positive regulation by Congress of compulsory unionism in the railroad industry, occupying the entire field to the express exclusion of the states. As such, it is an integral part of the whole Congressional scheme of regulation of railroad labor matters embodied in and labeled the Railway Labor Act.

One further point may be added. Constitutional law is a practical as well as theoretical field—as this Court has so often recognized. And as a practical matter there most assuredly is government action here. If it were not for the statutory privileges, powers, and favors which Congress has vested in the unions they would have been in no position to force the carriers here involved to sign an agreement making union membership a condition of continued employment and they would not have had the power to enforce such a condition of employment.

A case in point is *Terry v. Adams*, 345 U. S. 461, where the Court reviewed the action of a political association in a particular Texas county. This association, an admittedly private organization, held an election to select candidates for county office in the official Democratic primary. The elections run by the association were not governed by state law and did not utilize state electoral machinery or funds. Candidates selected by the association were not certified by it as candidates in the Democratic primary but filed their own names as candidtes. Almost invariably, however, the association's candidates were nominated in the Democratic primaries and chosen at the ensuing general election. Appraising the situation practically, this Court said:

> "The only election that has counted in this Texas county for more than fifty years has been that held by Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens." 345 U. S. at 469.

So here, the effect of the whole procedure—the Union Shop Amendment—plus the requirement of the Railway Labor Act that the company negotiate with the collective bargaining representative with respect to the union shop—plus the finding of Presidential Emergency Board No. 98 that the carriers should sign union shop agreements—plus the right to strike given by law to the unions to enforce their demands—is to accomplish precisely what the First and Fifth Amendments forbid—that is, they combine to confront Wicks and Jensen with the election of joining the union or losing their jobs, in violation of their freedom of religion, their right to work, and their freedom of association.

2. If Petitioners Are Discharged From Employment Because of Their Refusal to Join a Union, They Will Have Been Denied the Freedom of Religion Guaranteed to Them by the First Amendment to the Federal Constitution.

By way of preface it would be well to state the principle upon which, given the presence of government action, the Union Shop Statute is subject to test for invasion of individual liberties such as freedom of religion, right to work, and freedom of association. Although in the passage of the Statute Congress sought to exercise the extensive power to regulate interstate commerce vested in it by Article I, §8, cl. 3 of the Constitution, it is settled that that power over commerce is by no means unlimited. This Court has held in a number of cases that it must be exercised within the bounds laid out by other provisions of the Constitution, principally the Bill of Rights. *United States v. Chicago, Etc. R. Co.*, 282 U. S. 311, 327; *Currin v. Wallace*, 306 U. S. 1, 14; *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, 704-705.

No one doubts the bona fides of petitioners' stand that their religious convictions absolutely preclude them from joining and from making money contributions to respondent unions. In denying their claim that the freedom of religion secured to them by the First Amendment is threatened by the conduct sought to be enjoined, the district court was misled by the errors of Judge Hand in his off-hand rejection of the argument in *Otten v. Baltimore & Ohio R. Co., supra.* The Court of Appeals did not reach the question.

It is very difficult to understand Judge Hand's casual disposition of this point. He said, first, that the union has not excluded from membership those whose religious beliefs will not permit them to join. On this score he was quite right—the whole point of this argument is that Otten and petitioners will not join the union. Whether or not the union will have them is quite beside the point.

Judge Hand said that the ultimate question is whether the unions are to be forced to yield on their demand that those in the position of petitioners join or whether petitioners must compromise their religious beliefs. And then, inexplicably, he resolved the issue in favor of the unions and adverse to petitioners, observing that the First Amendment "gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." 205 F. 2d at 61. This is followed by a hypothetical example that a man with religious scruples against saloons has no right to have the city in which he lives close the saloons it has licensed. In other words, says Judge Hand, "We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life . . ." *Ibid.*

If Judge Hand is right, we may appropriately ask what has happened to the principle that First Amendment freedoms, including freedom of religion, occupy a preferred constitutional position? *Thomas v. Collins,* 323 U. S. 516, 530; *Murdock v. Pennsylvania,* 319 U. S. 105, 115; *Palko v. Connecticut,* 302 U. S. 319, 325. It is true that under extraordinary circumstances people have been required to make certain compromises with their religious convictions, but these have always involved legislation totally unlike that in question here. *Jacobson v. Massachusetts,* 197 U. S. 11—compulsory vaccination; *Shapiro v. Lyle,* 30 F. 2d 971—food inspection regulations; *Hamilton v. Regents,* 293 U. S. 245, 267—the obligation to bear arms; *Stansbury v. Marks,* 2 Dall. 213—testimonial duties; *People v. Vogelgesang,* 221 N. Y. 290, 116 N. E. 977—compulsory medical treatment.

The principal error in Judge Hand's approach is that he ascribes to the interest of the unions in compulsory unionism a position superior to freedom of religion. It is settled, however, that these two do not occupy any such status relative to one another. Whereas freedom of religion is, of course, protected by the First Amendment, it has been decided that unions and union members have no constitutional right to force all employees in a bargaining unit into union membership. In *Lincoln Union v. Northwestern Co.,* 335 U. S. 525, the unions argued that state right-to-work laws are unconstitutional because they deprive unions and their members of an asserted right to force all other employees in the bargaining unit either into union membership or out of work. This Court emphatically and specifically rejected this argument. 335 U. S. at 531. It follows, therefore, that when the two

interests considered by Judge Hand are weighed on a constitutional scale the balance must be in favor of freedom of religion—the other is not even a constitutional right.

The example given by Judge Hand of the necessity under some circumstances for compromising one's religious beliefs is clearly inapplicable to the instant case. He said that a person with religious scruples against saloons has no right to have the city in which he lives close them up. Of course, he was right in his hypothetical, but the analogy is as remote as it is lame. Petitioners are not trying to keep fellow employees from joining the union. All they ask is that they themselves not be required to join for the reason that to do so would violate their views of their religious duties.

Judge Hand's illustration would be apt if the hypothetical facts were altered so as to provide for a man with religious scruples against saloons who is forced, with the sanction of law, to patronize them continually against his will and contrary to his conscience. That situation would be analogous to the case at bar and it may be doubted whether Judge Hand would require the individual to compromise his religious scruples under circumstances of that sort.

As shown by the group of cases just cited, it is only the most unusual situation in which one can be required to compromise his religious beliefs. It is quite clear that there are not such unusual circumstances in this case, for the unions have no actual need to have petitioners included in their ranks, and there has never been any contention, let alone showing, that there is any connection between union membership and a man's fitness for rail-

road employment. In *Board of Education v. Barnette*, 319 U. S. 624, this Court upheld the right of school children to refuse on religious grounds to salute the flag. It held that their expulsion from school for their refusal violated their freedom of religion. The children there were not required to compromise their religious beliefs just as the appellants here must not be required to compromise theirs. Discharging a man from employment is no less a serious punishment than denial of the right to go to school.

Judge Harrison rules that petitioners are not entitled to relief because the action complained of is not discriminatory. It is not entirely clear what was intended by this, but viewed literally he must have meant that making union membership a condition of employment cannot be unconstitutional as applied to petitioners for the reason that all employees in the bargaining unit are subject to the provisions of the union shop agreement. This is clearly error, however, for it is of no consequence to an evaluation of the situation as it affects petitioners that all other workers must also belong to and support the union. In *Board of Education v. Barnette, supra,* this Court reviewed a requirement of the State of West Virginia that all public school children must salute the American flag and recite the Pledge of Allegiance. This was struck down as a violation of the religious freedom of those children who, as Jehovah's Witnesses, were forbidden by their religious beliefs to give the required flag salute and pledge. Although these children were not discriminated

against in that they were not singled out for subjection to the salute and pledge requirement, still it was held unconstitutional. Discrimination in that case and in this is quite an irrelevant consideration, for there is no need to prove discrimination in order to make out an infringement of the guaranty of religious freedom. The important feature of the *Barnette* case and those at bar is that the individuals involved in each are, in effect, punished because of their religious beliefs. In *Barnette* school children were suspended from school while in the case at bar workingmen are put out of work.

It should be pointed out, however, that petitioners actually are threatened with discriminatory action—they are threatened with loss of their jobs for the sole reason that their religion will not allow them to be union members.

Judge Harrison went on to rule that assuming the presence of government action petitioners could not invoke the First Amendment's guaranty of religious freedom because it merely "protects against prohibitions," citing *Mitchell v. Pilgrim Holiness Church*, 210 F. 2d 879.

On this score, the trial court has misread the constitutional guarantee of freedom of religion and evinced a misunderstanding of the *Mitchell* case and other decisions of similar import. The First Amendment, with respect to the freedom of religion, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Judge Harrison placed all his emphasis upon the provision of the Amendment forbidding a *prohibition* of the free exercise of one's religion whereas the emphasis should be upon *free exercise*. In other words, a restriction or condition may not amount to a prohibition but it may constitute a prohibition of the free exercise of religion.

This is well illustrated, in fact, by two cases referred to by the Court of Appeals in the *Mitchell* case—*Murdock v. Pennsylvania*, 319 U. S. 105, and *Follett v. Town of McCormick*, 321 U. S. 573. In each of these cases this Court struck down local taxes imposed on Jehovah's Witnesses for distribution of literature on the streets. In each there was obviously no prohibition involved—the individuals concerned could have paid the tax and distributed their religious literature to their heart's content. But the tax did constitute an impairment of the free exercise of religion and a violation of the constitutional guaranty.

On the merits, the *Mitchell* case, relied on by the trial court, is not unusual at all, but it has no application to the present problem. The Court of Appeals there simply ruled that a religious corporation which carries on a profitable printing and publishing business is subject to the Fair Labor Standards Act. The decision is an example of the well-settled doctrine that freedom of religion cannot be carried into ordinary business activities and used as an excuse for relief from the necessary burdens of business. It has no relevance to an effort to compel a man to join a private organization contrary to his religious convictions.

3. If Petitioners Are Discharged From Employment Because of Their Refusal to Join a Union, They Will Have Been Denied the Right to Work and Freedom of Association Guaranteed to Them by the First and Fifth Amendments to the Federal Constitution.

Just as important as their freedom of religion are petitioners' right to work and their freedom of association, both protected by the First and Fifth Amendments.

At this late date it can hardly be doubted that freedom of association and the right to work are protected by the Constitution. Freedom of association is, in fact, the very basis upon which the unions have always predicated their claim that workers have a right to join a union. This Court itself has recognized this freedom in its decisions sustaining modern labor legislation. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 34; *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 263; *Auto Workers v. Wisconsin Board*, 336 U. S. 245, 259.

This case involves the necessary converse of this right to join a union—and that is the right not to join. All fundamental constitutional liberties must, by definition, have both a negative and a positive side, although the emphasis customarily is on the positive. Without a negative of each right, without a right, for instance, not to speak, a right not to be religious, or a right not to publish a particular item, the positive side alone could not be said to constitute a freedom, for freedom must turn on the element of choice. In order for there to be a choice,

there must be both positive and negative alternatives. As the Supreme Court of Nebraska said in the *Hanson* case *supra:*

> "We think the freedom of association, the freedom to join *or not to join* in association with others for whatever purposes such association is lawfully organized, is a freedom guaranteed by the First Amendment." 160 Neb. at 696. (Emphasis supplied.)

And the Supreme Judicial Court of Maine recently said: "Freedom to associate of necessity means as well freedom not to associate." *Pappas v. Stacey,* 151 Me. 36, 116 A. 2d 497, 500, appeal dismissed, *Stacey v. Pappas,* 350 U. S. 870.

The very fundamental character of this proposition is reflected in Article 20 of the Universal Declaration of Human Rights of the United Nations:

> "1. Everyone has the right to freedom of peaceful assembly and association.
>
> "2. No one may be compelled to belong to an association."

The right to work has been specifically recognized by the Court in a number of instances. It was the basis upon which a Chinaman's right to be a laundryman was protected in *Yick Wo v. Hopkins,* 118 U. S. 256. In *Truax v. Raich,* 239 U. S. 33, it was raised to protect an alien's right to work in an Arizona restaurant. A teacher of the German language invoked it to protect his right to pursue his profession in *Meyer v. Nebraska,* 262 U. S. 390. In *Smith v. Texas,* 233 U. S. 630, the Court ruled that Texas could not condition a qualified man's right to be a railroad brakeman on totally irrelevant conditions. And only a few years ago the Court invoked the right

to work to protect the right of a Japanese fisherman to pursue his vocation off the coast of California. *Takahashi v. Fish and Game Commission*, 334 U. S. 410.

In the instant case, petitioners are told, with the express sanction of Congress, that they must join or support the union representing their craft or class of employment or be fired from their jobs. If the courts deny them the relief they seek, their right not to join a union will be abridged and they will be deprived of their right to work. Petitioners submit that such an invasion of their constitutional rights would contravene the guaranties of the First and Fifth Amendment for the reason that there is no sufficient reason to justify imposition of union membership or support as a condition of continued employment.

No candid person who knows the facts believes that the modern labor union needs the compulsory device afforded by the union shop. George M. Harrison, Grand President of respondent Brotherhood of Railway Clerks, appeared before committees of both houses of Congress in support of the bills which became the Union Shop Amendment of 1951 to the Railway Labor Act. He served as spokesman for all of the non-operating railroad unions. In the House, he was asked by Congressman Harris whether the union shop would enhance the collective bargaining strength of the unions. He replied:

> "No; I do not think it would affect the power of bargaining one way or the other, Congressman Harris * * *.
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> * * * * * * * *
>
> "If I get a majority of the employees to vote for my union as the bargaining agent, I have got as much economic power at that stage of development

as I will ever have * * *." *Hearings Before Committee on Interstate and Foreign Commerce on H. R. 7789,* 81st Cong., 2d Sess. 20-21 (1950).

In his recent book, *Collective Bargaining* (McGraw-Hill, 1953), at page 75, Selwyn H. Torff, a Chicago labor lawyer, says:

> "If the union-survival theory were to be accepted as the motivating basis for the demand for compulsory union membership today, there would be little support in reality for such a demand. The American labor movement has not been feeble for a long time; it is vigorous, aggressive, and effective. It is protected by law and fortified by strength. It is one of the most dominating, economic, political, and social institutions in the nation. It is beyond the capability of employers to destroy it, even if they so desired or attempted. And the day of attempts by employers to destroy unions as such seems long past; 'union busting' exists today largely as a propaganda term. For the great majority of employers, labor unions and the collective bargaining process are established facts of economic life. Whatever the compulsory union membership issue may once have involved it is no longer an issue that involves the survival of labor unionism in the United States."

The conclusion that the unions do not need the union shop is also supported by the findings of a governmental board. In 1942 several of the railroad unions demanded union shop agreements from the nation's carriers and the dispute was referred by President Roosevelt to an emergency board which has since come to be known as the "Scharfman Board." This Board correctly ruled that a union shop was precluded by the provisions of the Rail-

way Labor Act then in effect. But it did not stop there. It went on to examine the merits, and concluded:

> "Such an examination leaves the Board unconvinced on the ground of necessity. In the first place, the unions are not suffering from a falling off in members. On the contrary, as stated earlier, membership has been growing and at the present time appears to be the largest in railroad history, with less than 10 per cent nonmembership among the employees here represented.
>
> "Second, the evidence presented with respect to danger from predatory rivals seemed to the Board lacking in sufficiency; especially so in the light of the evidence concerning membership growth.
>
> "Third, no evidence was presented indicating that the unions stand in jeopardy by reason of carrier opposition. A few railroads were mentioned on which some of the unions do not represent a majority of their craft or class, and do not have bargaining relationships with the carrier. But the exhibits show that these unions are the chosen representatives of the employees on the overwhelming majority of the railroads, and that recognition of the union is general. The Board does not find therefore that a sufficient case has been made for the necessity of additional protection of union status on the railroads." Supplemental Report to the President by the Emergency Board, May 29, 1943.

It is also a matter of judicial record that respondent unions do not need the union shop. In the trial of *Sandsberry v. International Association of Machinists*, No. A-5061 on the docket of the Supreme Court of Texas, Dr. Leo Wolman, Professor of Economics at Columbia University, testified as to the growth of the

railroad unions in the years 1934-1951, when compulsory unionism in any form was expressly forbidden by the Railway Labor Act. In those years without the closed or union shop, the unions trebled their membership, extended their jurisdiction to cover, for practical purposes, every mile of railroad track in the United States, and registered corresponding gains in their financial positions.[4] An economic expert called by the unions conceded that the union shop is "not necessary."[5] The jury in the *Sandsberry* case was asked to decide a number of special issues of fact. In response to Special Issue No. 13, the jury found that the union shop is "not necessary" to the "continued existence and well-being" of respondent unions.[6]

It is accordingly submitted that since respondent unions have no need at all for the union shop the invasion of petitioners' right to work and freedom of association through the operation of the Union Shop Amendment of 1951 to the Railway Labor Act is unconstitutional and the Statute should be ruled null and void.

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[4]*Sandsberry v. International Association of Machinists,* Supreme Court of Texas, No. A-5061, Statement of Facts, pp. 1443-1456.

[5]*Id.,* at 1773. This same expert has since published the results of a study which led to the conclusion that the growth and spread of unions were not even slowed down by the right-to-work law enacted in Texas in 1947. Meyers, *Effects of "Right-to-Work" Laws: A Study of the Texas Act,* 9 Industrial and Labor Relations Review, 77, 78.

[6]*Id.,* Transcript, p. 230.

4. If Petitioners Are Discharged From Employment Because of Their Refusal to Join a Union, They Will Be Deprived of Their Property in Violation of the Due Process Clause of the Fifth Amendment.

The trial court conceded that petitioners "have accrued valuable rights such as seniority, retirement and pass privileges by virtue of their long time employment," but ruled that these "are not constitutional but are contractual." 121 F. Supp. at 457. But this is a clear *non sequitur*, for contract rights are in and of themselves property rights and, as such, are protected by the due process clause of the Fifth Amendment.

With respect to seniority rights, the district court, in its holding that these are not protected by the Constitution, has brought itself into square conflict with other courts which have specifically held that seniority rights are property rights protected by the Fifth Amendment. *Nord v. Griffin*, 86 F. 2d 481, 483-484; *Primakow v. Railway Express Agency*, 56 F. Supp. 413, 416; *Stephenson v. New Orleans & N. E. R. Co.*, 180 Miss. 147, 177 So. 509, 519. In the *Primakow* case, for instance, the court said:

> "Although the seniority rights of plaintiff arose under the collective bargaining agreement, seniority rights are the exclusive property of the individual employee. They are property within the Fifth Amendment of the United States Constitution." 56 F. Supp. at 416.

Seniority rights are not the only property rights threatened. If petitioners were to surrender to respondents'

threats, at least to the extent of making regular and periodic money payments to a union, they would—to the extent of such money payments—be deprived of their property. And few would doubt that depriving a man of a portion of his wages deprives him of his property.

But—as just outlined—respondent unions do not need the money that could be extracted from petitioners by a union shop agreement. It must follow that it would be unreasonable, arbitrary, and capricious—and in violation of the due process clause of the Fifth Amendment—to force petitioners, as a condition of continued employment, to pay initiation fees and regular dues and assessments to respondent unions.

If petitioners refuse to join a union—as is their intention—then they would likewise be deprived of their property in the form of seniority rights. That too would be unreasonable, arbitrary, and capricious, and consequently a violation of the due process clause of the Fifth Amendment.

5. Whether or Not Union Membership Shall Be Made a Nationwide Condition of Railroad Employment Is Not Simply a Question of Policy to Be Settled by Congress in the Exercise of Its Legislative Discretion.

The trial court concludes that the ultimate question involved here, that is, whether all railroad employees shall be required to join and support a labor union as a condition of continued employment, is one of legislative policy which should not be interfered with by the judiciary. This is a dangerous misconception, however, for it is within the exclusive province of Congress to determine whether or not the union shop shall prevail in the

railroad industry if—and only if—it is within the constitutional power of Congress to say that all railroad employees must join a union in order to hold their job. This latter question is purely a matter of judicial concern. This problem involves the necessary separation of the questions of power and policy. If Congress does have the power, then the question whether to exercise it is a question of policy and its determination is not subject to review in the courts. But if, because of limitations found in the Bill of Rights, Congress does not have the power—and whether it has is a matter for the judiciary—no amount of policy can help it.

Wherefore, petitioner pray:

1. That their petition for writ of certiorari be granted; or

2. That an order issue from this Court directed to the Honorable United States District Court for the Southern District of California, Central Division, and to the Honorable Ben Harrison, Judge of said Court, requiring said Honorable Ben Harrison to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Ben Harrison to vacate and expunge from the record the order of May 26, 1954, vacating the temporary restraining orders heretofore issued in these cases, denying petitioners' applications for a three-judge court and injunctive relief, and granting respondents' motions for summary judgment;

3. That said order of this Court require the Honorable United States District Court for the Southern District of California, Central Division, and the Honorable Ben Harrison, Judge of said Court, to show cause why

mandamus should not issue from this Court directing said Honorable Ben Harrison to convene a three-judge court under 28 U. S. C. Sec. 2282 to hear petitioners' prayers for injunctive relief; and

4. That petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

HILL, FARRER & BURRILL,

CARL M. GOULD,

RAY L. JOHNSON, JR.,

Attorneys for Petitioners.

APPENDIX A.

45 U. S. C. Section 152 Eleventh.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreement, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor

organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds

membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, Sec. 2, 44 Stat. 577; June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186; June 25, 1948, c. 646, Sec. 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

APPENDIX B.

In the District Court of the United States, Southern District of California.

George C. Wicks, Plaintiff, vs. Southern Pacific Company (Pacific Lines), a corporation, Defendant, Brotherhood of Maintenance of Way Employes, Intervening Defendant. No. 16189-BH.

Philip F. Jensen, Plaintiff, vs. Union Pacific Railroad Company, a corporation, *et al.*, Defendants, and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Intervenor-Defendant. No. 16305-BH.

Opinion.

These companion cases are suits to enjoin the discharge of plaintiff employees by the defendants pursuant to "union shop" agreements which require the discharge of employees who fail to join the union. The plaintiff in each case is a long time employee in good standing and each has acquired valuable rights such as seniority, pass privileges and the like by virtue of his employment. They refuse to join the union on the ground that to do so would be to violate the tenets of the religious sect to which they belong. The tenets of this sect, known as the Plymouth Brethren, forbid them from joining any organization composed in any part of non-members of the sect and they believe the unions to be such organizations. In response to their refusal the railroads and the union have entered into a supplemental agreement which would excuse the plaintiffs from any duties of membership, including the taking of the oath, save that they would be required to pay the same dues and assessments required of other

members. Believing that even this requirement would violate their religious beliefs and the plaintiffs continue their refusal.

Under the terms of the agreement the unions are to indemnify the railroads for any losses incurred by them arising out of performance of the agreement. In order to allow the unions to protect their interests they have been permitted to intervene. The intervenors have made a motion for summary judgment and it appearing that there are no issues of fact in dispute, the motion is in order. The original defendants have not joined in this motion but have conceded in oral argument that there are no issues of fact to be tried. Therefore, final disposition as to them at this time is likewise in order.

Identical legal issues to the ones presented in this case have recently been before the Court of Appeals for the Second Circuit in a case involving a strikingly similar factual situation. [Otten v. Baltimore & Ohio R. R. Co., 205 F. 2d 58 (1953).] That court in an opinion by Judge Learned Hand, the dean of the federal judiciary, denied the relief prayed for on the merits and specifically held that the case was not one calling for a three-judge court under 28 U. S. C. A. Sec. 2282. The only material difference between that case and this is that of the place where the events occurred. Judge Hand suggested that if the New York law, the place of the contract and of the employment forbade the union shop, which it did not, then a constitutional question might plausibly arise. However, in California, the place of this contract and of the plaintiffs' employment, as in New York, there is likewise no prohibition on the union shop agreement. [Colgate-Palmolive-Peet Co. v. N. L. R. B., *et al.*, 338 U. S. 355 (1950), 31 California Law Review 16.] Thus the reason-

ing of the court in the Otten case is equally applicable here.

This court has considered the legal issues present in this case independently of the Otten case and in doing so has considered plaintiffs' contention that the Eleventh subsection of the Railway Labor Act [45 U. S. C. A. Sec. 152] was beyond the legislative power of Congress. In this connection the Texas and Nebraska state trial court holdings cited as authority for the proposition have not been overlooked but I am not in accord with such court's view because of the difference in the laws of the states involved, assuming that the state laws can control an act of Congress in this field. Notwithstanding this contention, which plaintiffs urge was not considered in the Otten case, this court is of the opinion that the reasoning of the court in that case is very persuasive here. I feel that Judge Hand's reasoning is unassailable notwithstanding slighting comments of counsel.

The court in the Otten case held that there was no substantial constitutional question presented calling for a three-judge court, because the challenged statute did not affirmatively legalize union shop contracts and that in any event the palintiff was not entitled to the relief prayed for on the merits because the action of which he complained was not discriminatory. This court agrees with and adopts that holding. As a separate reason for denying relief, I also hold that the plaintiff's are not entitled to protection of the First Amendment of the United States Constitution because that amendment protects only against congressional action and it is not shown here that the action complained of is congressional. [Reynolds v. United States, 98 U. S. 145 (1878).]

Assuming by way of argument that there was congressional action present here, still the protection of the First Amendment could not be validly invoked by these plaintiffs. That amendment protects against prohibitions. This feature of the case is similar to a case recently decided by the Court of Appeals for the Seventh Circuit. [Mitchell v. Pilgrim Holiness Church Corp., 210 F. 2d 879 (1954); (Cert. applied for 22 Law Week 3296).] In that case a corporation engaged in religious work claimed to be exempt from the coverage of the Fair Labor Standards Act on the ground that to subject it to that Act would be to prohibit the free exercise of religion. This claim was rejected, the court saying: "We think that all of the above cases on which the defendant relies [cases in fact involving prohibitions on the free exercise of religion] are distinguishable from the instant case. The Act does not in this case prohibit the free exercise of religion. . . ." Nor can it be said that the plaintiffs' right to worship as they see fit has been prohibited or restricted before this court.

It is true that the plaintiffs have accrued valuable rights such as seniority, retirement and pass privileges by virtue of their long time employment. These rights, however, are not constitutional but are contractual. [Colbert *et al.* v. Brotherhood of Ry. Trainmen, 206 F. 2d 9 (9th Cir. 1953), (McCormick, J.).]

In deciding this case I am fully aware that the question of "union shop" and "closed shop" presents a highly controversial issue, in which our people have divergent opinions. I feel the problems involved are legislative rather than judicial. In deciding cases involving such problems, it is not the function of this court to interject personal

views but to endeavor to follow the law as the court finds it under the guidance of courts of superior authority, otherwise, decisions could very easily become the laws of men controlled by the individual views of the judge. I do not feel that a trial court should set at naught an act of Congress, unless it feels that such act is unconstitutional beyond a reasonable doubt. Whenever minds of men differ on such questions as herein involved such issues should be determined by a court that can bring finality to the question in dispute.

I believe my conclusions are in accordance with the rulings of the Supreme Court in Nicol v. Ames, 173 U. S. 509 (1899), wherein it said at page 514:

"It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation in violation of that fundamental instrument upon which all the powers of the Government rest." [See also Crowell v. Benson, 285 U. S. 22, 63 (1932); Arkansas Fuel Oil Co. v. Louisiana Ex. Rel. Muslow, 304 U. S. 197 (1938).]

The temporary restraining orders heretofore granted are hereby dissolved and the applications for permanent injunctions are hereby denied and said motions for summary judgments are granted. The applications for three-judge court are denied for the reasons herein stated.

Dated: This 26th day of May, 1954.

BEN HARRISON, *Judge.*

APPENDIX C.

In the United States Court of Appeals for the Ninth Circuit.

George C. Wicks, Plaintiff and Appellant, vs. Southern Pacific Co. (Pacific Lines), Defendant and Appellee; Brotherhood of Maintenance of Way Employees, Intervenor and Appellee.

Philip F. Jensen, Plaintiff and Appellants, vs. Union Pacific Railroad Co., a corporation, Defendant and Appellee; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Intervenor and Appellee. Nos. 1483-84.

Filed Mar. 6, 1956.

Appeals from the United States District Court for the Southern District of California, Central Division.

Before: Bone, Lemmon and Chambers, Circuit Judges; Bone, Circuit Judge.

By stipulation of the parties these two cases arising in California where appellants reside[1] were consolidated on this appeal since they involve the same issues arising out of ultimate facts similar in nature. The facts are not in dispute.

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[1]The complaints allege that Union Pacific Railroad Co. is a Utah corporation doing business in the Southern District of California, Central Division, and that the Southern Pacific Co. is a Delaware corporation doing business in the same geographical area. The jurisdiction of the lower court was based upon (a) diversity of citizenship; (b) a federal question presented, namely, the constitutionality of the provisions of the Railway Labor Act; (c) the matter in controversy exceeded the value of $3,000.00, exclusive of interests and costs.

Each appellant has long been an employee of one of the appellee railroads here involved, Wicks since 1914, Jensen since 1917; each has been continuously so employed except for a short time during the First World War; each is presently able, ready and willing to continue his service; the railroads are willing to continue that employment; each appellant has "built up" through his period of employment certain valuable benefits in terms of seniority, retirement rights (including a pension for the remainder of their natural lives after attaining the age of 65), hospital and medical care for the rest of their lives upon retirement at 65, and free railroad transportation in the United States, Canada and Mexico upon retirement. (The last named transportation privilege is granted by grace of company policy and not by right of any employment contract.) By reason of each appellant's refusal to join the union representing the appropriate bargaining unit in which his work places him, the intervening unions have ordered the employing railroads to dismiss both appellants. This procedure is in accordance with the terms of union shop clauses in the collective bargaining agreements which each union has with the railroads.

Appellants' refusal to join the union is apparently motivated solely by religious principles. However, they have offered to pay the required amount of the union fees, dues and assessments to some recognized charity, such as the Cancer Fund, or American Red Cross, but the unions found this offer unacceptable. To meet such a situation both unions entered into a supplemental agreement with the railroads under which any employee in their respective union bargaining units having genuine religious beliefs against joining a union, might avoid dismissal from railroad employment pursuant to the union shop

clause by simply paying the normal and regular union fees, dues and assessments into the union treasury. Under this arrangement appellants would avoid the necessity of becoming members of the unions, thereby escaping (what to them) would be the stigma of being identified as an "active member" of a union.

This proposed solution was rejected by appellants as also being in violation of their religious beliefs.[2]

Appellants exhausted available remedies under the grievance machinery established by the collective bargaining agreements between the unions and the railroads, and thereafter commenced this action against appellee railroads seeking to have Subsection Eleventh of the Railway Labor Act, *infra, permitting* a union shop, declared to be unconstitutional, and to permanently restrain defendant railroads, their officers, agents, representatives and employees, from terminating the employment and seniority rights of appellants. They also sought a preliminary injunction to restrain the discharge of appellants until a final determination of the action, a temporary restraining order pending hearing for a preliminary injunction, and for an order to show cause why such a preliminary in-

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[2]Appellants are members of a religious sect known as Plymouth Brethren and are unwilling to accept this sort of solution. The ground of their refusal is that any money they pay into the coffers of the unions will be aiding and abetting "unbelievers." This attitude of hostility to the idea of "joining" a union is based on scriptural grounds. As justification for their stand they rely on language found in Second Corinthians, Chapter VI, verse 14, which reads as follows: "Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath Light with darkness?" The record is void of any suggestion that union affiliation requires adherence of union members to any church, religious sect, or brand of theology.

junction should not issue, and if for any reason it became impossible or impractical for the court to so restrain defendants, then the court to grant a judgment restoring appellants to their employment without loss of seniority or other rights, together with damages.

Appellants made an application for a three-judge court to hear the claimed constitutional issues as provided in 28 U. S. C. A. §2282. The railroad unions sought and were permitted to intervene in each case. Temporary restraining orders against dismissal were issued, but upon further proceedings in the cases these orders were dissolved and the applications for permanent injunctions were denied. Motions for summary judgments and dismissals of appellants' actions were granted. From this final action appellants prosecuted this appeal.

The dispute in these cases stems from the fact that by an amendment of January 10, 1951 to the Railway Labor Act, 45 U. S. C. A. §152, Eleventh, a so-called 60 day "union shop" agreement provision is *permissible*. Prior to this amendment union security agreements were invalid under 45 U. S. C. A. §152, Fourth and Fifth, of this Act.[3]

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[3]45 U. S. C. A. §152, Fourth, reads, in part, "Employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."
Subsection Fifth reads, in part, "No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization. . . ."
Subsection Eleventh reads, in part, "Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or

At oral argument here appellants for the first time raised the question of the jurisdiction of this Court to hear and decide an appeal from the action of the lower court in these cases. As to this phase of the cases they assert that since the constitutionality of an Act of Congress was in issue the lower court was required to convene a three-judge court to hear their demands for a permanent decree restraining operation of an allegedly unconstitutional Act of Congress (*i. e.*, Subsection Eleventh), as apparently required by 28 U. S. C. A. §2282.[4] The gist of their argument is that a single district court judge lacks jurisdiction to grant the motions for summary judgments and dismissals, with the result that this Court also has no jurisdiction to hear an appeal from such an action by the lower court.

Appellants buttress their argument on the issue of lack of our jurisdiction on this appeal by reliance on four cases, Stratton v. St. Louis S. W. Ry. Co., 282 U. S. 10 (1930); *Ex parte* Poresky, 290 U. S. 30 (1933); Grigsby v. Harris, S. D. Tex., 27 F. 2d 945 (1928); and

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carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class. . . ."

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

[4]28 U. S. C. A. §2282 reads, "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Waddell v. Chicago Land Clearance Commission, 7 Cir., 206 F. 2d 748 (1953). All of these cases arose under 28 U. S. C. A. §2281, a statute providing for a three-judge court when the validity of a state statute is at issue on federal constitutional grounds.[5]

On authority of Stratton v. St. Louis S. W. Ry. Co., *supra*, it is urged to us that a single district judge acts without jurisdiction when he grants summary judgment and dismissal of an action where the complaint raises the question of constitutionality of an Act of Congress by seeking relief in the form of "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States . . ." 22 U. S. C. A. §2282. In reliance upon the Stratton case, *supra*, appellants now urge that the appropriate procedure following such action by the lower court was for them not to appeal to this Court (since it would lack jurisdiction in such an appeal) but rather to directly petition the Supreme Court for mandamus directing the district court judge to convene a three-judge court.

We have found no case which adequately discusses and disposes of the precise issue thus tendered here, that is to say, the power of this Court to entertain an appeal from the refusal by the lower court to convene a three-judge

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[5]28 U. S. C. A. §2281 reads, "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

court, and the granting of summary judgments and dismissals by the district judge. But we conclude that the cases called to our attention fail to sustain the jurisdictional contentions of appellants.

From a reading the Stratton and Poresky cases, *supra*, we are of the opinion that the trial judge sitting alone may initially determine if there is a "substantial" federal constitutional issue presented by a complaint which seeks an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress as being repugnant to the United States Constitution. We believe that a single district judge may dismiss a complaint if he decides that a substantial constitutional issue is not raised therein. It is only where a single district judge decides that a complaint raises a substantial constitutional issue and proceeds to decide that issue on its merits, that he acts without jurisdiction. The remedy for such action is to seek mandamus from the Supreme Court to compel the convening of a three-judge court to hear and decide the substantial constitutional issue in the case on its merits.

Our view of the four cases cited above by appellants is supported by California Water Service Co. v. City of Redding, 304 U S. 252 (1938), a case involving 28 U. S. C. A. §2282, in which the Supreme Court said: "We have held that §266 of the Judicial Code [now 28 U. S. C. A. §2281] does not apply unless there is a *substantial claim* of the unconstitutionality of a state statute or administrative order as there described. *It is* therefore *the duty of a district judge*, to whom an application for an injunction restraining the enforcement of a state statute or order is made, *to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as*

otherwise the provision for the convening of a court of three judges is not applicable. Ex parte Buder, 271 U. S. 461, 467; *Ex parte* Poresky, 290 U. S. 30. We think that a similar rule governs proceedings under §3 of the Act of August 24, 1937, as to the participation of three judges in passing upon applications for injunctions restraining the enforcement of federal statutes upon the ground of constitutional invalidity." (At pp. 254-5, emphasis supplied.)

In the cases at bar the district judge issued temporary restraining orders pending hearing on the applications for preliminary injunctions restraining discharge of appellants until final determination of their requests for a permanent restraining order and pending a hearing on the application to convene a three-judge court. After such a hearing the lower court found and determined that no substantial constitutional issue was presented in the complaints of appellants,* dissolved the temporary re-

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*That the lower court based its determination of the cases on the question of substantiality of the constitutional issues involved may be seen by quoting parts of its decision. "Identical legal issues to the ones presented in this case have recently been before the Court of Appeals for the Second Circuit in a case involving a strikingly similar factual situation. [Otten v. Baltimore & Ohio R.R. Co., 205 F. 2d 58 (1953).]

"This court has considered the legal issues present in this case independently of the Otten case and in doing so has considered plaintiffs' contention that the Eleventh subsection of the Railway Labor Act [45 U.S.C.A. §152] was beyond the legislative power of Congress. . . . Notwithstanding this contention, which plaintiffs urge was not considered in the Otten case, this court is of the opinion that the reasoning of the court in that case is very persuasive here. I feel that Judge Hand's reasoning is unassailable notwithstanding slighting comments of counsel.

"The court in the Otten case held that there was no substantial constitutional question presented calling for a three-judge court. . . . This court agrees with and adopts that holding." 121 F. Supp. 454, 456-7, S. D. Cal. 1954.

straining orders and granted summary judgments dismissing both actions. We regard this action as proper under the circumstances of these cases particularly in view of the holdings in the cases cited above.

In Schermerhorn, Inc. v. Holloman, 10 Cir., 74 F. 2d 265 (1934) the plaintiff demanded the convening of a three-judge court. This demand was denied by the trial judge who dismissed the action. The Tenth Circuit Court said, "A trial judge is authorized to determine in the first instance whether a case is one requiring disposition by a special court convened in accordance with the statute, and he is not required to call two additional judges to his assistance unless the case is of that nature. [Cases cited.] *His decision upon the question is subject to review.*" (At p. 266, emphasis supplied.) We hold that this Court does have jurisdiction to entertain and dispose of this appeal.

On the merits, appellants assert that the "ultimate issue" before us is whether the district court correctly decided that there was no substantial constitutional issue raised in these cases. We think that its conclusion on this issue was correct.[7] We further conclude that the summary judgments of dismissal were proper and that the district court did not err in refusing to convene a three-judge court.

Appellants claim that there are substantial constitutional issues in these cases because the union shop amendment of 1951 deprives them of their right to work and of freedom of association contrary to the Fifth Amendment

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[7]The decision of Judge Harrison from which the instant appeals were taken is Wicks v. Southern Pacific Co., Jensen v. Union Pacific R.R. Co., S. D. Cal., 121 F. Supp. 454 (1954). *Cf.* Allen v. Southern Ry. Co., W. D. N. C., 114 F. Supp. 72 (1953).

guarantee that no person shall be deprived of liberty or property without due process of law. Appellants assert that Subsection Eleventh requires involuntary money payments which is a deprivation of appellants' property without due process of law in that it is an exercise of the taxing power in favor of private organizations. They further contend that they are denied freedom of assembly, petition, speech and religion as secured by the First Amendment. All the foregoing contentions are based upon the First and Fifth Amendments to the Constitution which prohibit Congressional action within certain enumerated areas.[8]

We are persuaded that the case of Otten v. Baltimore & O. R. Co., 205 F. 2d 58, 2 Cir. (1953), was correctly decided and is dispositive of appellants' contentions. The facts and legal issues in Otten practically duplicate those in the cases at bar. The court there said: ". . . to succeed, the plaintiff must insist that Subsection Eleventh is unconstitutional because it repealed Subsection Fifth so far as it had affected 'union shop' agreements; and that it affirmatively legalized them. That, however, is plainly a misconception of its effect, which was equivalent only to a repeal, *pro tanto*, of Subsection Fifth. Although that subsection had made such agreements illegal, its repeal left them as they were before it was passed; and there can be no plausible argument that to repeal such a statute was unconstitutional . . . In this aspect the plaintiff's claim of unconstitutionality is too 'unsubstantial' to require a 'three-judge' court." (At p. 60.)

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[8]The First Amendment, apparently, does not preclude Congressional action in all circumstances, Reynolds v. U. S., 98 U. S. 145 (1878).

Assuming, *arguendo*, that an Act of Congress which "affirmatively legalized" the so-called union shop would be invalid within the purview of the First and Fifth Amendments, we believe that an amendment "which was equivalent only to a repeal, *pro tanto*," of the prior Subsection Fifth (along with Subsection Fourth) would not raise a constitutional issue since it would in no way have "affirmatively legalized" a so-called union shop. Since we view Subsection Eleventh to be equivalent to a repeal, *pro tanto*, of the prior subsections above noted, we think it unnecessary to discuss arguments of appellants that Subsection Eleventh is "affirmative legalization" of the "union shop," or "affirmative regulation" of the contents of union security provisions in collective bargaining agreements. As was further said in Otten, *supra*, "The Eleventh subsection of §152 of Title 45 U. S. C. A. permits a railway and a union to agree to a 'union shop' notwithstanding any 'statute or law,' state or federal, that forbids such agreements. . . . We cannot understand how the subsection can be regarded as conferring validity on the agreement, since all it does is to exempt it from nullification by other statutes or laws."[9] (At p. 60.)

It was pointed out in Otten, *supra*, that there "might" be a substantial constitutional issue if state law *prohibited*

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[9]*Cf. Allen v. Southern Ry. Co.*, W.D. N.C., 114 F. Supp. 72, (1953), where, following the convening of a three-judge court to hear the constitutional issues raised by Subsection Eleventh in juxtaposition to the state's so-called "right to work" statute, the court remanded the case to the state court as it viewed the case not to arise under the Constitution and laws of the United States. The court said, in part, "The amendment to the Railway Labor Act of which we take judicial notice must unquestionably be considered in passing upon the case; but the complaint states no cause of action arising under that statute, the effect of which is to destroy any cause of action which plaintiff might otherwise have had under state law." (At p. 73.)

the union shop while the amendment of Congress *permitted* the union shop. But the Second Circuit found no substantial constitutional issue on this ground as New York law did not *prohibit* the union shop.[10] Here again, these cases before us fall within the facts of the Otten case. California, like New York, *permits* union security agreements, including a form even more liberal than the so-

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[10]In reference to this aspect of the Otten case, *supra*, appellants argue that an Act of Congress could not be constitutional in those states which permit union shops and be unconstitutional in those states which prohibit union shops by means of their "right to work" statutes. The gist of this argument is that an Act of Congress must be constitutional in **all** states or be unconstitutional in **all** states. Appellants rely on Hanson v. Union Pacific Railroad Company, 160 Neb. 669, 71 N. W. 2d 526 (1955), where the court apparently held the amendment (Subsection Eleventh) to be an unconstitutional exercise of the power of Congress since it violated the "due process" rights of the individual employee to freedom of association, his right to work, and his right to keep proceeds of his work without making involuntary contributions to labor unions the expenditure of which the individual worker might disapprove. The Hanson case is not persuasive because we are not here confronted with a California statute which in any way questions the validity of contractual agreements of the exact character of those here involved, whereas Nebraska does have a "right to work" statute.

Another state court has quite recently decided much the same issue that was before the court in the Hanson case, that is, the validity of a Congressional Act when applied in a state having on its statute books one of the so-called "right to work" acts Hudson v. Atlantic Coast Line R.R., ... N. C. ....., 89 S. E. 2nd, 443 (1955). The North Carolina Court phrased the issue thusly, "Is a union shop agreement, complying in all respects with the provisions of the Union Shop Amendment to the Railway Labor Act . . . void under the North Carolina statute, sometimes called the Right to Work Act . . .?" The court proceeds, "This question, of primary importance to decision, must be answered, 'No.'" (At pp. 445-6) The North Carolina Supreme Court held the Act of Congress here involved superseded the state law where they were in conflict, as the Act of Congress was passed pursuant to the powers of Congress to regulate interstate commerce, Constitution of the United States, Article I, §8, Clause 3. In discussing these two cases we are not unmindful of the fact that the issues presented to the North Carolina Supreme Court were somewhat narrower than the issues presented to the Nebraska Supreme Court.

called union shop, namely the "closed shop." Consult Colgate-Palmolive-Peet Co. v. N. L. R. B., 338 U. S. 355, 361 (1949), and cases there cited.

Appellants also contend that there is a substantial constitutional issue in these cases because Subsection Eleventh was not passed pursuant to the power of Congress to regulate interstate commerce.[11] We disagree. While this issue apparently was not argued in the Otten case, *supra*, the trial court in the two cases before us did consider the argument and reached the conclusion that "notwithstanding this contention . . . this court is of the opinion that the reasoning of the court in that case [Otten, *supra*] is very persuasive here."[12]

Our ultimate conclusion is that the Subsection Eleventh is to be regarded as *pro tanto* repeal by Congress of the sections which proscribed the so-called union shop and that in this posture the legislation does not pose a substantial

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[11]The Railway Labor Act of 1926 (and the 1934 amendments) with provisions for collective bargaining between a railroad company and its employees, and prohibiting either company or employees to exert influence on the choice of bargaining representatives by the other has been found constitutional. Texas & N.O.R. Co. v. Brotherhood of Railway and S.S. Clerks, 281 U. S. 548 (1930); Virginian R. Co. v. System Federation No. 40, 300 U. S. 515 (1937). Appellants rely upon Adair v. United States, 208 U. S. 161 (1908), and Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 330 (1935), which seem to say that union membership and retirement pensions have no legal or logical connection with interstate commerce. But in view of the Texas & N.O.R. Co. v. Brotherhood of Railway and S.S. Clerks, *supra*, and Virginian R. Co. v. System Federation No. 40, we believe the cases cited by appellants are not controlling on the facts before us. See Mandeville Is. Farms v. American C.S. Co., 334 U. S. 219, 230 (1948), where Mr. Justice Rutledge, speaking for the majority of the Court, listed the Alton case as one "foredoomed to reversal," though the formal reversal has not yet taken place.

[12]Wicks v. Southern Pacific Co., Jensen v. Union Pacific R.R. Co., S.D. Cal., 121 F. Supp. 454 at 456 (1954).

constitutional issue over Congressional regulation or interstate commerce.

It is contended by appellants that the union security agreement before us violates the Thirteenth Amendment since it requires appellants to involuntarily pay over a part of their earnings to the union. The Thirteenth Amendment prohibits for all time slavery or involuntary servitude in the United States, with the exception of punishment for a crime of which the prisoner has been duly convicted, Bailey v. Alabama, 219 U. S. 219 (1911). We think that appellants' argument on this point is without substance or merit. The cases cited by appellants are not controlling in the fact situations before us.[18]

The essence of slavery or involuntary servitude is that the worker must labor against his will for the benefits of another, Crews v. Lundquist, 361 Ill. 193, 197 N. E. 768 (1935); Hodges v. United States, 203 U. S. 1, (1905); *Ex parte* Drayton, D. C. S. C., 153 Fed. 986 (1907). There is no contention that appellants cannot freely leave their employment with the railroads (and/or withdraw from the unions if they should join them) and thus escape payment of dues, fees and assessments to these railroad unions. While leaving their present employment would entail serious losses in terms of seniority rights, medical

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[18]The cases cited are Bailey v. Alabama, 219 U. S. 219 (1911); Taylor v. Georgia, 315 U. S. 25 (1942); Pollock v. Williams, 322 U. S. 4 (1944). In these cases state statutes imposed penal sanctions on a party who breached his written contract of employment. *Cf.* Peonage Cases, 123 Fed. 671 (1903). Nor should the dissent of Mr. Justice Holmes in Bailey v. Alabama, *supra*, be overlooked for an illuminating comment on involuntary servitude taking the form of peonage. It should be noted that these cases arose under an Act of Congress pursuant to Section 2 of the Thirteenth Amendment, Act of March 2, 1867, c. 187, §1, 14 Stat. 546, 42 U. S. C. A. §1994.

benefits and retirement benefits, the fact remains that appellants are not being compelled or coerced to work against their will for the benefit of another.

A substantial constitutional issue was not raised in the complaints of appellants. The lower court correctly disposed of these cases and its summary judgments and dismissals are hereby affirmed.

(Endorsed:) Opinion. Filed Mar. 6, 1956.

Paul P. O'Brien, Clerk.